

V I R G I N I A:

BEFORE THE VIRGINIA GAS AND OIL BOARD

PETITIONER:	ISLAND CREEK COAL COMPANY	) VIRGINIA GAS
		) AND OIL BOARD
v.		)
		)
RESPONDENT:	GEOMET OPERATING COMPANY, INC.	)
		)
RELIEF SOUGHT:	APPEAL OF DECISION BY THE DIRECTOR	) DOCKET NO.
	OF THE DIVISION OF GAS AND OIL	) VGOB-08-
	DATED MAY 4, 2008, IN INFORMAL	) 0617-2261
	FACT FINDING CONFERENCE 21108	)
	("IFFC 21108")	)

REPORT OF THE BOARD

FINDINGS AND ORDER

1. Hearing Date and Place: This matter came on for a reconsideration hearing before the Virginia Gas and Oil Board (hereafter "Board") at 9:00 a.m. on October 21, 2008 at the Southwest Virginia Higher Education Center on the campus of Virginia Highlands Community College, Abingdon, Virginia. This setting was the result of a Motion for Reconsideration filed by Island Creek Coal Company on June 25, 2008 following an appeal on June 17, 2008 at which the Board had sustained the Division Director's IFFC 21108 decision.

2. Appearances: Mark Swartz, Esq., and Jonathan Blank, Esq., appeared for the Petitioner, Island Creek Coal Company; S. Thomas Mullins, Esq., appeared for the Respondent, GeoMet Operating Company, Inc.; George Mason, Esq., appeared for LBR Holdings, LLC; and Sharon Pigeon, Esq., Senior Assistant Attorney General, was present to advise the Board.

3. Jurisdiction and Notice: Pursuant to Va. Code §§ 361.1, et seq., the Board finds that it has jurisdiction over the subject matter of this hearing. Respondent, GeoMet Operating Company, Inc., moved the Board to dismiss the Motion for Reconsideration filed by Island Creek Coal Company and to sustain GeoMet's Motion to Dismiss on the grounds that Petitioner lacked standing under Va. Code §§ 45.1-361.23(A), 45.1-361.11, 45.1-361.12, and 45.1-361.35. On motion and vote, the Board denied Respondent GeoMet's Motion to Dismiss, relying on Va. Code § 45.1-361.36(A) and the Administrative Process Act at Va. Code §§ 2.2-4000 et seq. The Board finds that it has jurisdiction to re-hear and decide their earlier decision of June 17, 2008, prior to issuance of an order and before any appeal of that decision has been filed, under Petitioner's Motion to Reconsider. The Board also finds that the notices given herein satisfy all statutory requirements, Board rule requirements and the minimum standards of due process.

4. Relief Requested: Petitioner, Island Creek Coal Company, appealed the Division Director's decision in IFFC 21108, requesting:

- a. That the Board's June 17, 2008 decision upholding the Division Director's IFFC 21108 decision be reconsidered;
- b. That IFFC 21108 be reversed and remanded to the Division of Gas and Oil;
- c. That the Director of the Division of Gas and Oil be instructed on remand to deny Respondent GeoMet's well permit application in this matter; and,
- d. For such further additional relief as the Board may deem appropriate.

5. Special Findings: The Board specifically and specially finds:

5.1 That Petitioner Island Creek Coal Company is an operator under the requirements of the Va. Gas and Oil Act as set out in §§ 45.1-361.1, et seq. duly authorized and qualified to transact business in the Commonwealth of Virginia, and has satisfied the Board's requirements for such operations;

5.2 That Petitioner Island Creek Coal Company is a coal operator from whom a consent to stimulate is required in order to permit the well unit which is the subject of this Order;

5.3 That Petitioner Island Creek Coal Company is a coal owner with standing to object to this proposed drilling unit application pursuant to Va. Code § 45.1-361-12; and,

5.4 That the relief requested and granted is just and reasonable, and is supported by substantial evidence. Therefore, the Board is entering an Order granting the relief herein set forth.

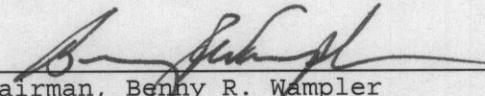
5. Appeal Relief Granted: The Petitioner's requested relief on appeal in this cause is hereby GRANTED.

6. Conclusion: The decision of the Director of the Division of Gas and Oil dated May 4, 2008 in IFFC 21108, attached hereto, is hereby REVERSED and REMANDED, and the relief requested in the appeal of Island Creek Coal Company is granted. The Director of the Division of Gas and Oil is directed to deny GeoMet's application for a permit until such time as the application contains consent to stimulate satisfying Va. Code § 45.1-361.29 and is in compliance with Va. Code § 45.1-361.12. IT IS SO ORDERED.


7. Appeals: Appeals of this Order are governed by the provisions of Va. Code Ann. § 45.1-361.9 which provides that any order or decision of the Board may be appealed to the appropriate Circuit Court where interlocutory relief may also be sought.

8. Effective Date: This Order shall be effective as of the date of the Board's decision on October 21, 2008.

DONE AND EXECUTED this 23<sup>rd</sup> day of October, 2008, by a majority of the Virginia Gas and Oil Board.

  
Chairman, Benny R. Wampler

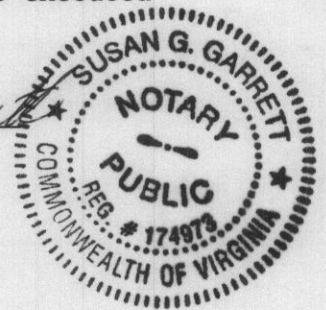
DONE AND PERFORMED this 23<sup>rd</sup> day of October, 2008, by Order of this Board.

  
David Asbury  
Principal Executive to the Staff  
Virginia Gas and Oil Board

STATE OF VIRGINIA       )  
COUNTY OF WISE        )

Acknowledged on this 23<sup>rd</sup> day of October, 2008,  
personally before me a notary public in and for the Commonwealth of  
Virginia, appeared Benny Wampler, being duly sworn did depose and say  
that he is Chairman of the Virginia Gas and Oil Board, that he executed  
the same and was authorized to do so.

Susan G. Garrett  
Notary Public



My commission expires: 7/31/10

STATE OF VIRGINIA       )  
COUNTY OF WASHINGTON   )

Acknowledged on this 23<sup>rd</sup> day of October, 2008, personally  
before me a notary public in and for the Commonwealth of Virginia,  
appeared David Asbury, being duly sworn did depose and say that he is  
Principal Executive to the Staff of the Virginia Gas and Oil Board,  
that he executed the same and was authorized to do so.

Susan G. Garrett  
Notary Public



My commission expires: 7/31/10

Department of Mines, Minerals and Energy  
Division of Gas and Oil  
P. O. Box 1416  
230 Charwood Drive  
Abingdon, VA 24212  
Telephone: (276) 676-5423  
Fax: (276) 676-5459

B. R. Wilson, Director, Division of Gas and Oil

By Decision of the  
Director, Division of Gas and Oil

Informal Fact Finding Conference 21108 (Herein "IFFC 21108")

Island Creek Coal Company  
(Herein "Coal Owner")

vs.

GeoMet Operating Company, Inc.  
(Herein "Permit Applicant")

RE: Permit Applications for Gas Operations  
Rogers 209 VA-ZZZ41 (Application # 10080)  
Rogers 201 CBM F44 (Application # 10140), and  
Rogers 202 CBM F45 (Application # 10141)

(Herein "Applications")

Background

On May 9, 2007, the Division of Gas and Oil (DGO) received an application for permit from GeoMet Operating Company, Inc. ("GeoMet") for gas operations named Rogers 209 VA-ZZZ41. On June 1, 2007, the Division of Gas and Oil (DGO) received an application for permit from GeoMet Operating Company, Inc. ("GeoMet") for gas operations named Rogers 201 CBM F44 and Rogers 202 CBM F45. Due to the lack of a consent to stimulate coal seams as required by § 45.1-361.29.F(2), the permit was not issued in a timely manner. On February 7, 2008, DGO received a letter from Street Law Firm, LLP, S. T. Mullins, Esq., representing GeoMet. The letter asked that the permit be issued without further delay. In a reply letter dated March 3, 2008, this Director denied the request because of the lack of a consent to stimulate, and notified GeoMet of the right to request an Informal Fact Finding Conference (IFFC) or appeal the decision directly to the Virginia Gas and Oil Board. On March 11, 2008, DGO received a letter from S. T. Mullins, counsel for GeoMet, requesting an IFFC.

Section 9-6.14:11 of the Virginia Administrative Processes Act requires that agencies ascertain the fact basis of their decisions through informal conference or consultation proceedings unless such proceedings are waived in favor of formal hearing. GeoMet requested an informal hearing in lieu of direct appeal to the Virginia Gas and Oil Board.

Hearing Date and Place

IFFC 21108 was convened on Thursday April 3, 2008 in the conference room of the Division of Gas and Oil, 230 Charwood Drive, Abingdon, Virginia. GeoMet Operating Company, Inc. and Island

Creek Coal Company were notified of the time and place by United States certified mail, return receipt requested.

#### Appearances:

Counsel Mark Swartz appeared on behalf of Island Creek. Tim Blackburn, Jeff Taylor and Ertel Witt, Jr. Appeared for the Applicant along with counsels Pebbles Deel, Tom Mullins and Scott Sexton.

#### Findings of Fact:

1. In accordance with § 9-6.14:11 of the Virginia Administrative Processes Act, IFFC 21108 was scheduled and notice was given to the Permit Applicant and to all involved parties.
2. IFFC 21108 was convened at the time and place indicated in notice.
3. Island Creek Coal Company was listed on the Application as coal owner within 750 feet of the proposed well.
4. LBR Holdings, LLC is the fee owner of coal properties and lessor to Island Creek Coal Company.
5. There are no known mining plans or mining permits in the area of the proposed well and no mining has been conducted under the lease for 24 years.
6. GeoMet has rights to develop coalbed methane resources on the subject properties subsequent to farmout agreement from Equitable Production Company, lessee.
7. Permit has not been issued because GeoMet has been unable to obtain required consent to stimulate from coal owner.
8. Pertinent testimony from IFFC 20908 was incorporated into the record of IFFC 21008. Notice indicated that the conferences would be combined for hearing.

#### Controlling Law and Regulation

1. Section 45.1-361.45.29.F.2(a) requires that every permit application for a coalbed methane well shall include, among other things, a signed consent from the operator of each coal seam located within 750 horizontal feet or 100 vertical feet of any coal the applicant proposes to stimulate. Section 45.1-361.29.F.2(b) states that the consent may be contained in a lease or instrument of title.
2. Section 9-6.14:11 of the Virginia Administrative Processes Act requires agencies to ascertain the fact basis of decisions of cases through informal conference of consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing.

#### Decision of the Director

Applicant testified that the lease of coal from lessor Lon Rogers to lessee Island Creek Coal Company expressly reserved the right to develop oil and gas reserves and, as such, consent to stimulate from the lessee is not required. Applicant contends that requiring consent to stimulate from Island Creek would be allowing breach of their contract with Rogers. However, the requirement for consent to stimulate is statutory (§ 45.1-361.29.F.2.a). If lease terms are thought to have been violated, the issue must be handled by a proper court, not the Division of Gas and Oil or the Virginia

Gas and Oil Board. For purposes of this hearing, Island Creek's standing as a coal owner under the Gas and Oil Act is confirmed.

Permit Applicant rightfully stated that the units involved in IFFC 21108 (Oakwood Field Units F44 and F55) have been pooled by the Virginia Gas and Oil Board, and GeoMet Operating Company was named operator of the unit. Applicant further contends that pooling of unit interests, including, in this case, those of CNX Gas Company, LLC, conveys to Applicant all rights of the pooled parties. Applicant introduced as Exhibit 1 the "Master Cooperation and Safety Agreement" executed by, among others, Island Creek Coal Company and CNX Gas Company, LLC in which the coal parties agree to "...deliver any waiver or consent as may be reasonably required....including, without limitation, with regard to well spacing restrictions...". Applicant interprets this agreement to mean that CNX Gas Company, LLC has rights to stimulate coals and to permit wells without concern for distance requirements under § 45.1-361.12, and that these rights, through pooling orders, are vested in the designated operator of the units. Under this line of reasoning, Island Creek would have no rights to object under terms of § 45.1-361.12, and their objections should be rejected. While § 45.1-361.21.A states that "The Board...shall enter an order pooling all interests in the drilling unit for the development and operation thereof", the clear implication of the statute (§§ 45.1-361.21 & 45.1-361.22) is that pooling orders only convey rights to develop oil and gas interests, and that these are the only interests under the Board's authority. The pooling order, itself, in paragraph 7, "Relief Granted" states, in part, "All interests and estates in and to the gas (emphasis added) ...be and hereby are pooled in the Subject Formation in the Subject Drilling Unit". The statute spells out the Board's authority and obligation regarding oil and gas rights, but is completely silent regarding authority to convey or affect other rights such as surface rights, coal owner rights or rights governed by private agreements. As an example, a pooling order gives the unit operator the right to develop coalbed methane subject to a coal owner's claim, but does not convey the coal owner's right to stimulate the coal or abridge the coal owner's right to object to the location of the well. The Master Cooperation and Safety Agreement details many specific responsibilities, obligations and benefits for parties to the agreement. Among the benefits provided are the previously mentioned consents and well spacing waivers as well as a right of first refusal to participate in any future projects any of the signers may acquire anywhere in the United States. It would seem unreasonable to propose that a pooling order issued by the Virginia Gas and Oil Board would provide the designated operator with the right of first refusal or, and no less unreasonably, any other rights granted by this private contractual agreement. The pooling orders and the Master Cooperation and Safety Agreement, together of separately, do not affect Island Creek's right or standing under the Virginia Gas and Oil Act, and do not in any way relieve requirement for consent to stimulate.

The primary argument presented at IFFC 21108 involved more fundamental aspects of requirements for consent to stimulate and the methods employed by DGO in its permit assessment procedures. Applicant contends that Island Creek does not meet the requirements of a "Coal Operator" as defined in the Gas and Oil Act, and therefore GeoMet has no need for Island Creek's consent to stimulate.

Section 45.1-361.1 contains two pertinent definitions:

- "Coal Operator" means any person who has the right to operate or does operate a coal mine.
- "Coal Owner" means any person who owns, leases, mines and produces, or has the right to mine and produce, a coal seam.

Section 45.1-361.29.F details requirements for permits for coalbed methane wells including:

- A signed consent from the coal operator of each coal seam which is located within 750 horizontal feet of the proposed well location.

Applicant contends that Island Creek does not need to give consent to stimulate for the Permit Applications because (1) the statute requires consent from "coal operators", not "coal owners"; (2) in order to qualify as a "coal operator", one must be actively operating a mine or must have the right to actively operate a mine; (3) under state statute, it is unlawful to operate a mine without a license or permit from the state; (4) Island Creek has no mining permits or active operations within distances much greater than 750 feet from any of the proposed GeoMet operations; (5) Island Creek does not meet the definition of "Coal Operator", and GeoMet is not required to obtain consent to stimulate

from Island Creek. Island Creek rebutted that the lease with LBR Holdings grants to Island Creek the right to mine coal, and that nothing more is needed to qualify as a "coal operator" under statute.

At the request of the Director, counsels for Island Creek and GeoMet expounded on differing views of the statutory requirements and definitions. GeoMet stated that the legislative intent was to protect active and ongoing mining operations from any hazards associated with coal seam stimulation, but was not intended to require consents from owners of coal seams that were not being mined or subject to existing plans to mine. GeoMet argued that the purpose of the Gas and Oil Act was to encourage gas development, and that requiring consents to stimulate in areas that are not being mined or have no commercially workable coals would be contrary to that objective. Island Creek responded that the legislation was for the purpose of protecting all coal from potential harm, and that "Coal Operator" and "Coal Owner" can be essentially the same entity under the definitions. Island Creek argued that a consent to stimulate is required from anyone having a lease to mine coal or, in the absence of a lease, the fee owner of the coal regardless of whether the coal is being mined or is subject to a license to mine.

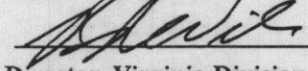
Since promulgation of the Virginia Gas and Oil Act of 1990, the Division of Gas and Oil has instituted requirements that are in accord with the view of Island Creek. That is, a consent to stimulate coal within 750 feet of the proposed coalbed methane well has been required from either the mine operator, the coal lessee, or the coal fee owner in that order. Stated differently, all coals subject to stimulation as defined in § 45.1-361.29.F(2) are required to have a consent to stimulate from some owner. This is the real point of contest in this IFFC, and is one that has apparently not been raised before. GeoMet is challenging DGO's procedures and interpretation of statutes that require consent from some "Coal Owner" and is proposing that the "Coal Operator" definition is much narrower and is what the law demands.

A compelling case was made that the intent of the law is well demonstrated by the fact that the Virginia Gas and Oil Act contains separate definitions for "Coal Operator" and "Coal Owner", and refers only to the "Coal Operator" in its requirement for consent to Stimulate. On reflection, it seems illogical that two definitions would be used if there was no difference in the meaning of the two terms Or complete overlap between them. While 18 years of precedent at DGO is not to be ignored, any possibility that that precedent was built on false interpretation of statute must be addressed. It is, therefore, the decision of the Director that Island Creek Coal Company is not a "Coal Operator" in the area of the subject Applications, and that no consent to stimulate from Island Creek will be required for Rogers 209 VA-ZZZ41 (Application # 10080), Rogers 201 CBM F44 (Application # 10140), or Rogers 202 CBM F45 (Application # 10141). Because this decision is contrary to years of practice at DGO, it will not be instituted into general policy, if appeals are filed and expeditiously pursued, until all appeals have been heard or appeal rights have expired. DGO reserves the right to implement policy changes at any time with appropriate notice.

#### Right of Appeal

Any party aggrieved by this decision of the Director may appeal the decision to the Virginia Gas and Oil Board by filing a petition with the Board. No petition or appeal may raise any matter other than matters raised by the Director or which the petitioner put in issue either by application or by objections, proposals or claims made and specified in writing at the informal fact finding conference.

Signed this 4th day of May, 2008

 (signature)  
Director, Virginia Division of Gas and Oil

① Mark Luntz, Esq  
P.O. Box 1808  
St Albans, WV 25177

~~White Hall~~

⑥ Bob Weann  
jewel  
smokeless  
coal/calcu  
P.O. Box 70  
Vansant Va  
24656

② Jonathan Blank, Esq.  
McLuire, Woods LLP  
P.O. Box 1288  
Charlottesville Va 22902

Certified copies  
Diane-original

③ S. J. Mullins, Esq.  
Street Law Firm  
PO Box 2100  
Grundy Va 24614

\*\* mailed  
certified  
on Monday,  
11/3/08.  
JA

④ Scott Sexton Esq  
PO Box 40013  
Roanoke, Va 24022

⑤ George Mason, Jr. Esq.  
841 Corporate Dr., Suite 203  
Lexington KY 40503

**Davis, Diane**

**From:** Pigeon, Sharon  
**Sent:** Thursday, October 30, 2008 2:24 PM  
**To:** Davis, Diane  
**Subject:** RE: CONFIDENTIAL ATTY-CLIENT COMMUNICATION

Can't recall if Jewell Smokeless and Calico were at the IFFC, but if they participated below, they should get copies.

**From:** Davis, Diane  
**Sent:** Thursday, October 30, 2008 2:22 PM  
**To:** Pigeon, Sharon  
**Subject:** RE: CONFIDENTIAL ATTY-CLIENT COMMUNICATION

We can do certified and I assume we need to send to Mullins, Swartz, Mason, Sexton, Blank - anyone else.

Diane

**From:** Pigeon, Sharon  
**Sent:** Thursday, October 30, 2008 11:16 AM  
**To:** Asbury, David  
**Cc:** Davis, Diane; Wampler, Benny; Lambert, Butch  
**Subject:** RE: CONFIDENTIAL ATTY-CLIENT COMMUNICATION

No, but to start the appeal clock running, it has to be received by the parties. Although it is in their hands as part of my Plea in Bar, I would be happier if all received official certified mailings.

**From:** Asbury, David  
**Sent:** Thursday, October 30, 2008 11:13 AM  
**To:** Pigeon, Sharon  
**Cc:** Davis, Diane; Wampler, Benny; Lambert, Butch  
**Subject:** RE: CONFIDENTIAL ATTY-CLIENT COMMUNICATION

Sharon,

Based on § 45.1-361.26 we would not normally record a Board Decision on an appeal. Do you disagree and want us to have the Board Orders recorded?

David

**From:** Pigeon, Sharon  
**Sent:** Thursday, October 30, 2008 10:57 AM  
**To:** Asbury, David  
**Cc:** Wampler, Benny  
**Subject:** CONFIDENTIAL ATTY-CLIENT COMMUNICATION

As you can see from the email below, Mark has offered to prepare drafts for the 2 remaining IFFC appeal orders and I have accepted the offer. I want to get the 1<sup>st</sup> one officially entered asap [& then the other 2] so that the Street Gang will have the appeal deadline before the Writ hearing. That will strengthen the Board's action, etc. Let me know what we need to do here to expedite that.

**From:** Mark Swartz [mailto:mswartz@swartzlawoffices.com]

10/30/2008

**Sent:** Thursday, October 30, 2008 10:38 AM

**To:** Pigeon, Sharon

**Subject:** RE:

We will get you drafts in short order. It would be great if these orders could get entered before the writ hearing so we can get the time for appeal running. Thanks.

Mark

---

**From:** Pigeon, Sharon [mailto:Sharon.Pigeon@dmme.virginia.gov]

**Sent:** Thursday, October 30, 2008 10:34 AM

**To:** Mark Swartz

**Subject:** RE:

Mark – That could be helpful, as I will probably bounce it back on David to do otherwise. The Street Gang & I have just agreed on a setting for the Writ hearing – 12.22 @ 11:00. Apparently Tom & Scott plan to attend [& George, no doubt, and maybe Ben]. Their appeal time will run between now & then if the Order is transmitted timely, etc., so I guess they will need to decide which avenue will be the road not taken.

---

**From:** Mark Swartz [mailto:mswartz@swartzlawoffices.com]

**Sent:** Thursday, October 30, 2008 10:27 AM

**To:** Pigeon, Sharon

**Cc:** Blank, Jonathan T.; lesarrington@cnxgas.com

**Subject:**

Fro  
Sharon,

Thanks again for all your good work.

Would it assist you if we prepared and submitted a draft order for your consideration regarding the Board's decisions on the two appeals affecting CNX and GeoMet at the October hearing? Let me know if it would be helpful to you.

Mark

10/30/2008